

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. WB 17-44

REQUEST FOR WAYBILL DATA

Digest:<sup>1</sup> This decision denies appeals of a ruling by the Acting Director of the Office of Economics relating to access to the Confidential Carload Waybill Sample.

Decided: March 22, 2018

This decision responds to the separate appeals filed by Thompson Hine LLP, on behalf of itself, Economists, Inc., and L.E Peabody & Associates, Inc. (collectively Requestors), and by the Association of American Railroads (AAR) of the ruling by the Acting Director of the Office of Economics on Requestors' request for access to the Confidential Carload Waybill Sample (CCWS). For the reasons discussed below, the Board affirms the Acting Director's ruling.

BACKGROUND

In a letter filed October 20, 2017, Requestors sought access, as "other users" under 49 C.F.R. § 1244.9(c), to the unmasked CCWS (including the masking factors) for 2006 through 2016.<sup>2</sup> Requestors indicated that they intend to use the CCWS to develop "a rate benchmarking standard as an alternative to [the stand-alone cost (SAC) test]" to be submitted to the Board. (Requestors' Letter 4.) According to Requestors, the benchmarking standard would be based on "an econometric model that measures the statistical relationship between rail rates and shipment characteristics to predict the competitive rate levels for captive rail traffic." (*Id.*) After the Board published notice of the request in the Federal Register, 82 Fed. Reg. 50,220 (Oct. 30, 2017); 82 Fed. Reg. 52,764 (Nov. 14, 2017) (correcting a date in the October 30, 2017 notice), AAR filed a timely objection to release of the requested CCWS data.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Under the Board's regulations, railroads submitting waybill data are permitted to encrypt or "mask" revenue associated with contract shipments to safeguard confidentiality. 49 C.F.R. § 1244.3(b).

After considering the request and AAR's objections, the Acting Director of the Office of Economics partially granted the request on December 27, 2017. Specifically, the Acting Director made a determination to release the CCWS, but only for the years 2006-2013 (rejecting the request for the years 2014-2016). The Acting Director also declined to provide unmasked revenue data and masking factors. After being granted an extension, Requestors and AAR filed timely appeals of the Acting Director's determination on January 16, 2018, and replies to the appeals on January 26, 2018. Requestors appeal only the decision not to provide unmasked revenue data, while AAR appeals the release of any CCWS data.

## DISCUSSION AND CONCLUSIONS

Parties appealing waybill determinations by the Director of the Office of Economics face a high burden. Pursuant to 49 C.F.R. § 1011.6(b), "[a]ppeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." The Board finds that neither Requestors nor AAR have demonstrated a clear error of judgment by the Acting Director or manifest injustice flowing from his decision. Because AAR objects generally to any release of the CCWS, the decision addresses AAR's arguments first, then turns to Requestors' contention that the Acting Director should also have agreed to disclose unmasked revenues.

### *1. The AAR Appeal*

AAR advances three reasons why the Acting Director erred in granting Requestors access to CCWS data. First, AAR contends that Requestors are "transportation practitioners" under 49 C.F.R. § 1244.9(b)(4) and therefore cannot gain access to the CCWS as "other users" under 49 C.F.R. § 1244.9(c). Second, AAR argues that Requestors are not entitled to access because their proposal to develop a benchmarking alternative to SAC is "incompatible with the statutory scheme." (AAR Appeal 3.) Third, AAR asserts that certain CCWS data has been designated Sensitive Security Information (SSI) by the Department of Transportation (DOT) and that the Board, therefore, may not release that data without permission from DOT. As discussed below, the Board finds no clear error or manifest injustice in the Acting Director's resolution of these issues.

#### *a. Other Users*

The Board's regulations at 49 C.F.R. § 1244.9(b)(1)-(4) define four specific categories of users for the CCWS—railroads; federal agencies; states; and transportation practitioners, consulting firms, and law firms in specific proceedings. The regulation at 49 C.F.R. § 1244.9(c) defines a separate category for all "other users." AAR contends that the Acting Director misinterpreted the unambiguous language of the regulations by concluding that Requestors were eligible to seek CCWS access as "other users." In particular, it argues that the specific user categories are mutually exclusive from the category of other users: "[b]ecause transportation practitioners are plainly 'described' in paragraph (b)(4), no transportation practitioner can be an 'Other User' within the meaning of § 1244.9(c)." (AAR Appeal 5.) In support, AAR cites to three letters dated February 29, 2012 (2012 Director rulings), in which the Director of the Office

of Economics at the time denied requests by railroads to access the CCWS as other users. AAR maintains that applying a different standard in this case would be arbitrary and capricious.

Requestors disagree, maintaining that the specific user categories under § 1244.9(b) and the other users category under § 1244.9(c) are not mutually exclusive. They argue that subsection (b)(4) controls how transportation practitioners gain access to the CCWS in specific proceedings, while subsection (c) provides an avenue for access in other circumstances. Moreover, Requestors point out that the Interstate Commerce Commission (ICC)'s purpose in distinguishing between the specific categories of users and "other users" had to do with whether "notice and protest" procedures should apply to various types of access requests. (Requestors Reply 3-5.) See Procedures on Release of Data from the ICC Waybill Sample (49 C.F.R. Part 1244), 4 I.C.C.2d 194, 200-05 (1987). Specifically, Requestors note that subsections (b)(1) through (b)(4) create limited exceptions where "notice and protest" procedures are not required, while subsection (c) continues to require such procedures where the circumstances that justify an exception do not exist. Further, Requestors assert that the 2012 Director rulings referenced by AAR are not binding on the Board. They also argue that the rulings are distinguishable both because they refer to restrictions imposed on railroad access to competitive data under subsection (b)(1) that are not applied to practitioners in subsection (b)(4) and because the proposed uses were not consistent with public policy.

The Board finds that the Acting Director's determination did not involve a clear error in judgment or manifest injustice in permitting the request to be processed under the § 1244.9(c) other users category. AAR's proposed interpretation of the regulations is both unduly narrow and inconsistent with the ICC decision adopting the regulations. As a threshold matter, nothing in the text of the regulations mandates AAR's conclusion that a user from a category identified in subsections (b)(1)-(4) may only seek access to the CCWS under those sections. Thus, AAR's argument that the Acting Director's decision "plainly conflicts with the language of the regulation" is incorrect. (AAR Appeal 6)

The more straightforward reading of the text is that users who qualify under one of the categories enumerated in subsection (b) may take advantage of the somewhat less onerous requirements imposed on access in that subsection, but that users who do not qualify must go through the additional steps specified in subsection (c) to gain access. This interpretation is supported by Procedures on Release, where the ICC clearly indicated that, in adopting the subsection (b) specific user categories, it was identifying circumstances where an exception from the notice and protest procedures of subsection (c) could be made. 4 I.C.C.2d at 200-03, 205, 211. In Procedures on Release, the ICC also explicitly acknowledged that railroads are entitled to ask for—although they may not necessarily receive—access to CCWS data pertaining to other railroads under the other users provision. Specifically, the ICC stated that railroads have "direct access to those waybill records pertaining to rail traffic in which they actually participated" pursuant to subsection (b)(1), but "are subject to notice and protest procedures for all other confidential waybill data" pursuant to subsection (c). Procedures on Release, 4 I.C.C.2d at 211; see id. at 205 ("railroads are only subject to notice and protest procedures for a limited segment of traffic . . . i.e., a competitor's traffic" and "the notice and protest procedures apply to railroads and shippers alike"). There is nothing in the text of the regulations that suggests the same is not

true for transportation practitioners. Thus, AAR's assertion that subsections (b) and (c) are mutually exclusive is at odds with the ICC's framework.

The 2012 Director rulings cited by AAR involved different circumstances from the one here. There, in denying railroad requests for waybill access under § 1244.9(c), the Director expressed concern about railroads obtaining confidential contract information from other railroads. The Director also appears to have been concerned that the proposed use of that highly confidential, competitively sensitive information for strategic studies and litigation analysis was not consistent with the public policy purpose of the CCWS. The Board's decision today should not be read to disturb those broader findings. To the extent, however, that the Director's conclusions in those rulings regarding the general availability of the other user category may appear inconsistent with the reasoning above, the Board declines to adopt those conclusions.

For the reasons discussed above, the Board does not agree that parties who are entitled to seek access to the CCWS under § 1244.9(b)(1)-(4) are precluded from seeking access as "other users" under § 1244.9(c).

*b. Legitimate Need*

AAR argues that the Acting Director "ignored the primary objection raised by the AAR"—specifically, that Requestors have no "legitimate need" for the CCWS. (AAR Appeal 7-8.) AAR argues that waybill access may only be granted "to meet a particular and legitimate need." (AAR Appeal 7 (citing Procedures on Release, 4 I.C.C.2d at 199).) It argues that Requestors seek access to develop a rate benchmarking alternative to SAC, even though the "law is clear that challenged rates cannot be judged by comparison to other so-called 'competitive' rates," and that Requestors therefore lack a legitimate need for the data. (AAR Appeal at 7-8.) More specifically, AAR argues that a rate benchmarking approach is both infeasible and legally impermissible, asserting that benchmarking is fundamentally inconsistent with differential pricing, that benchmarking has been rejected by the agency and courts, and that Requestors have failed to present a sufficiently developed approach. (Id. at 8-14.)

Requestors respond that they have adequately demonstrated a legitimate need for the CCWS data and that AAR's benchmarking-related arguments are premature. Requestors indicate that they intend to develop a benchmarking approach based on econometric analysis that seeks to calculate competitive prices based on movement characteristics. Requestors deny, however, that such an approach is precluded by law, as AAR contends. Requestors anticipate that any methodology they develop will address concerns raised by AAR related to differential pricing and revenue adequacy. They argue that AAR's waybill access challenge is "based upon arguments that Thompson Hine's approach to benchmarking is unlawful and/or unworkable before Thompson Hine has had the opportunity to fully develop, evaluate and test its concept, for which the [CCWS] data is critical." (Requestors Reply 9.)

The Board finds no clear error or manifest injustice in the Acting Director's conclusion that the Requestors, "[i]n seeking to develop an alternative rate reasonableness methodology based on benchmarking," had "sufficiently demonstrated a legitimate need for some CCWS data." Acting Director's Decision at 1. It was a proper exercise of the Acting Director's

delegated discretion to permit limited access to the CCWS and to refuse AAR's demand to prejudge the viability of all SAC alternatives that mention the concept of benchmarking. While the agency and courts have expressed reservations about the suitability of particular price comparison approaches for the largest rate cases, that does not translate into a ban on even considering newly developed benchmarking approaches. Neither agency precedent nor that of the courts required the Acting Director to accept such a blanket prohibition in the context of a waybill request.

The Board believes that the public interest is served by permitting Requestors to use the CCWS to prepare a submission to the Board regarding potential alternatives to SAC that could mitigate the heavy burdens that litigating a SAC case imposes on shippers, railroads, and the Board. Indeed, the Board recently established a new agency rate reform task force to explore SAC alternatives. See Consumers Energy Co. v. CSX Transportation, Inc., NOR 42142, slip op. at 74 (STB served Jan. 11, 2018; updated Mar. 14, 2018) (Board Member Begeman, commenting). The Acting Director's conclusion that Requestors' intention to develop a SAC alternative for presentation to the Board was a legitimate need and that the CCWS would be "highly relevant to the Requestors' planned submission to the Board" was appropriate. Acting Director's Decision at 2. Likewise, Requestors' explanation of how they plan to use the CCWS data is sufficient to support the Acting Director's determination to provide limited access to the dataset.

*c. Sensitive Security Information*

AAR asserts that the Acting Director's decision would improperly disclose information about toxic inhalation hazard (TIH) movements—such as origin, destination, type of commodity, and quantity—that AAR claims has been designated SSI by DOT. AAR relies upon SSI Order 2011-06-FRA-01 (July 29, 2011) (DOT Order), an order issued by DOT that addresses detailed rail traffic disclosures made by railroads in discovery during Board proceedings.<sup>3</sup> AAR claims that the DOT Order prohibits disclosure of SSI outside of a particular proceeding. AAR also cites to DOT regulations at 49 C.F.R. Part 15 that govern the release of SSI, arguing that these regulations prohibit the Board from disclosing SSI to Requestors because Requestors are not "covered persons." (AAR Appeal at 3, 15-16.)

Requestors disagree with AAR's argument, asserting that the DOT Order relied upon by AAR addresses only the disclosure obligations of railroads in Board rate regulation proceedings, not actions of the Board itself. Requestors also argue that the Board is not subject to the disclosure restrictions of 49 C.F.R. Part 15 because it is not a "covered person." (Requestors Reply 10 n.9.) Lastly, Requestors argue that, even if the DOT Order applies, Requestors would be authorized to receive the CCWS in connection with an existing or future proceeding before the Board.

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<sup>3</sup> The DOT Order can be found on the Board's website by clicking on Industry Data, then Economic Data, then Rate Cases, or at [https://www.stb.gov/stb/industry/Rate\\_Cases.htm](https://www.stb.gov/stb/industry/Rate_Cases.htm).

The Acting Director did not commit a clear error in judgment or manifest injustice in determining that AAR had failed to establish that the Board lacked the legal authority to provide access to the CCWS in this context. AAR's reliance on the DOT Order is misplaced. That order neither addresses what data may be disclosed by the Board nor designates the CCWS as SSI. As Requestors point out, the DOT Order addresses the SSI obligations of *railroads*, not the Board. And it pertains to specified "[r]ailroad traffic information produced by a railroad in the course of an administrative proceeding before the Surface Transportation Board." (Appendix to DOT Order.) AAR's contention that the DOT Order also covers disclosure *by the Board* of a *different* dataset maintained by the Board cannot be reconciled with the text of the DOT Order itself.

AAR's argument that DOT regulations prohibit the Board's release of CCWS is also unpersuasive. Contrary to AAR's assertion, the CCWS does not appear to fall under either the statutory or regulatory definition of SSI. The governing statute authorizes DOT to "prescribe regulations prohibiting disclosure of information obtained or developed *in ensuring security*." 49 U.S.C. § 40119(b) (emphasis added). DOT's implementing regulations similarly define SSI as "information obtained or developed *in the conduct of security activities*." 49 C.F.R. § 15.5(a) (emphasis added). AAR makes no effort to establish that the CCWS is "obtained or developed" by the Board as part of "ensuring security" or "security activities"; instead, AAR baldly asserts that "there is no question that certain TIH traffic information in the CCWS constitutes SSI." (AAR Appeal 16.) The CCWS is collected by the Board, in furtherance of the Board's function as an economic regulator of freight railroads, under regulations originally promulgated by the ICC in 1981, long before the current SSI legal regime became law. See 49 C.F.R. pt. 1244 (noting in the authority designation subheading that the Board collects CCWS data under its own statutory authority at 49 U.S.C. §§ 1321, 10707, 11144, 11145); Waybill Analysis of Transp. of Property—R.Rs. (49 CFR 1244), 364 I.C.C. 928 (1981) (noting that ICC began collecting a continuous sample of carload waybills in 1946). AAR cites nothing that finds that the CCWS is SSI, as defined by statute or regulation, or that Congress intended to modify the Board's CCWS regulations when it enacted the SSI governing statute.<sup>4</sup>

## 2. Requestors' Appeal

Requestors appeal only one aspect of the Acting Director's decision: the denial of access to unmasked revenue data. In his decision, the Acting Director stated that "release of contract rates in the unmasked waybill sample is not necessary for a 'proof of concept' of a new alternative to SAC." Acting Director's Decision at 2. Requestors argue that the phrase "proof of concept" is a mischaracterization of their stated purpose. They state that they intend to expand upon a model developed by the Transportation Research Board (TRB) of the National Academy of Sciences,<sup>5</sup> and that to expand upon that study, they require access to the same CCWS that

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<sup>4</sup> DOT's SSI regulations apply if the SSI disclosure in question is *made by* a "covered person" as that term is defined in 49 C.F.R. § 15.7. See 49 C.F.R. § 15.9(a)(2). AAR fails to discuss whether the Board, as an independent agency and economic regulator, is a covered person under 49 C.F.R. § 15.7.

<sup>5</sup> See Transportation Research Board, TRB Special Report 318: Modernizing Freight Rail Regulation (2015), <http://www.trb.org/Main/Blurbs/172736.aspx>.

TRB possessed, which included unmasked revenue data. Requestors assert that “the masking factors easily could introduce so much noise to the data that the model would be unable to draw accurate statistical inferences.” (Requestors Appeal at 3.) They also assert that accounting for revenue adequacy in their proposal requires “aggregated financial data for each Class I railroad and accurate (i.e., unmasked) [CCWS] revenue data at the individual movement level.” (Id. at 4.)

Requestors maintain that the Board’s existing procedures for ensuring confidentiality of CCWS data are sufficient to prevent competitive harm to shippers or railroads. Requestors also argue that, given their acceptance of the Acting Director’s decision to grant access to only 2006-2013 data, “the age of that data renders it less likely to be competitively sensitive to any shipper or railroad.” (Id. at 5.) They point out that they have previously been granted access to unmasked revenue data and that, in rate proceedings, they often have access to detailed railroad traffic data that is even more commercially sensitive. Requestors do not believe that providing access to unmasked revenue data here would open the door to future requests for speculative uses, as the AAR alleged in its original reply to the waybill request.

AAR argues that shippers and railroads will suffer irreparable harm if the Board grants access to unmasked revenue data here. AAR submitted verified statements from four railroad officials to bolster its argument that release of unmasked revenue data would be harmful.<sup>6</sup> AAR expresses particular concern about the effect of releasing sensitive contract data to consultants who regularly represent shippers in rate negotiations. Additionally, AAR states that the Board rarely grants access to unmasked data and has done so “only where it was essential either for a complainant to prepare its case or for parties to respond to a Board request for an empirical analysis.” (AAR Reply 3.) AAR contends that Requestors have not adequately explained their need for unmasked revenue data, and notes in particular that Requestors’ proposal to use aggregate revenue information in conjunction with individual movement revenue from the CCWS cannot work because of the recognized disconnect between data from the R-1 annual reports and CCWS data. AAR observes, in response to Requestors’ claim that they are entitled to be treated the same as the TRB for purposes of granting access, that “Requestors and the TRB are not remotely similar.” (Id. at 15.)

The Acting Director did not commit a clear error in judgment or manifest injustice in declining to grant Requestors access to unmasked revenue data at this time. As the Acting Director determined, although the Requestors have made a sufficient demonstration to support access to a substantial volume of CCWS data, they have not sufficiently demonstrated that they cannot move forward with their proposed analysis without unmasked revenue data. Despite Requestors’ disagreement with the “proof of concept” language used by the Acting Director, Requestors are clearly at a relatively early stage in the development of a potential new methodology, a stage at which the unmasked revenue data is unnecessary. Requestors argue that

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<sup>6</sup> In its reply to Requestors’ appeal, AAR asks that, if the Board decides to release unmasked contract revenue information, the Board also stay its decision pending judicial review. On January 30, 2018, Requestors submitted a letter serving as a limited reply to AAR’s stay request.

unmasked data is essential because masked data could distort the statistical relationships they hope to establish, but they fail to justify the need for that degree of precision at this stage, particularly given that they do not object to using data that is more than four years old. They also fail to explain, beyond simply asserting a need, how unmasked CCWS revenue data would be used in conjunction with separately-reported aggregate revenue data to address revenue adequacy concerns.

The Board must balance the Requestors' purported need for the data against the commercially sensitive nature of the unmasked revenue data. It is undeniable that unmasked revenue data is among the most commercially sensitive data railroads possess. Historically, the Board has been very protective of this data, granting access only in limited circumstances. The Board has held this data close despite the availability of confidentiality agreements because, as a matter of process, limiting dissemination of sensitive data decreases the likelihood that the information will be improperly used or disclosed. In this light, the Board finds unpersuasive Requestors' assertions that confidentiality agreements (or protective orders) provide fully adequate protection and that the requested data is too old to be particularly sensitive. Based on Requestors' description of their proposed inquiry, masked revenue data is fully adequate based on the showing made at this time. It is clearly within the Board's discretion, and the Acting Director's, to decline to grant access to unmasked revenue data unless and until there is a more concrete methodology in need of refinement.

Because the Board upholds the Acting Director's decision not to grant access to unmasked revenue data, we need not address AAR's request that the Board stay its decision pending judicial review in the event of a contrary determination on this particular issue.

It is ordered:

1. Requestors' appeal is denied.
2. AAR's appeal is denied.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.